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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1957

No. 996

ANN WARNER,

Petitioner,

vs.

LEO LIEBERMAN and ELEANOR LIEBERMAN,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

On the undisputed facts in the record, are the respondents entitled to judgment as a matter of law?

STATEMENT OF THE CASE

For the purposes of this argument, respondents do not controvert the statement of the case set forth in petitioner's petition.

ARGUMENT

I.

On the Undisputed Facts in the Record, the Respondents Are Entitled to Judgment As a Matter of Law.

(a) Summary judgment may be granted in a negligence action.

Petitioner erroneously argues that summary judgment under the Federal Rules of Civil Procedure may not be granted in a negligence action. The complete answer to this contention is that there is no language in Rule 56 of those rules which so limits its application. Rule 56 provides in material part as follows:

> "(b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.
>
> "(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages."

Furthermore summary judgments have been uniformly allowed in the following negligence actions where there was, as here, no issue of fact to be determined: *Zampos v. United States Smelting Refining and Min. Co.*, 206 F. 2d 171 (CA 10th Cir); *Surkin v. Charteris*, 197 F. 2d 77 (CA 5th Cir); *American Airlines v. Ulen*, 186 F. 2d 529 (CA DC Cir); *Thomas v. Furness (Pacific) Limited*, 171 F. 2d 434 (CA 9th Cir), certiorari denied, 337 U S 960, 93 L ed 1759; *Heagney v. Brooklyn Eastern Dist. Terminal*, 190 F. 2d 976 (CA 2nd Cir), certiorari denied, 342 U S 920, 96 L ed 688; *Wendelen v. Commander Larabee Milling Company*, 187 F. 2d 732 (CA 2nd Cir); *Archer v. United States*, 217 F. 2d 548 (CA 9th Cir), certiorari denied, 348 U S 953, 99 L ed 745; *Wilkinson v. Powell*, 149 F. 2d 335 (CA 5th Cir); *Polly Chin Sugai v. General Motors Corporation*, 137 F. Supp. 696 (Idaho S.D.). See also Moore's Federal Practice 2nd Edition Vol. 6, Sec. 56.17 (42), p. 2232 and cases cited thereunder.

There is no issue as to facts here nor was there in the Court of Appeals or District Court. Respondents for the purposes of this argument do not controvert the statement of the case set forth in petitioner's petition. Based upon the undisputed facts considered in a light most favorable to petitioner, the learned Court of Appeals and District Court held as a matter of law actionable negligence was not established on the part of respondents. The Court of Appeals said (Petitioner's Appendix 3A):

> "The substantive law of Wisconsin applies to this case.
>
> "The general rule is that where a guest is invited to come into the premises of the host for social purposes, the relation thus created is one of licensor and licensee and the rule of ordinary care does not apply. *Greenfield v. Miller*, 173 Wis. 184, 180 N.W. 834. Where the relation of licensor and licensee exists,

a licensee can recover only for the setting of a trap by, or for active negligence of, the licensor, *ibid.* 190.

"In *Leacko v. Chas. A. Krause Milling Co.*, 179 Wis. 83, 190 N.W. 924, it was held that a mere licensee on private property takes the premises as he finds them and that the owner owes him no duty save to refrain from active negligence rendering the premises dangerous. Active negligence includes the maintenance of a hidden trap, as in *Meyer v. Menominee & M. L. & T. Co.*, 151 Wis. 279, 138 N.W. 1008, a pitfall as in *Brinilson v. Chicago & N. W. R. Co.* 144 Wis. 614, 129 N.W. 664, or a partly concealed, open and unprotected stairway to a lower level, near a point at which an elderly customer was invited to go when she came into defendant's hardware store, as in *Lehman v. Amsterdam Coffee Co.*, 146 Wis. 213, 131 N.W. 362.

"The licensor does owe to a licensee a duty to refrain from acts of active negligence rendering the use of the premises dangerous to the use of licensee. *Masek v. Bubenheimer*, 229 Wis. 194, 281 N.W. 924. In the *Masek* case it appeared that defendant drove a pipe with sharp rough edges into the ground, so that its top was only eight inches above the ground and quite incapable of being seen in the nighttime, without notifying plaintiff or her husband, who were tenants in plaintiff's building on said premises, and plaintiff was injured when she struck her foot against the pipe in the dark. The court held that whether the defendant was guilty of active negligence was for the court to determine under all of the circumstances.

"We must not lose sight of the distinction between active negligence and passive negligence. Therefore, the language of 65 C.J.S. 496 is in point:

> "'* * * It follows that, as a general rule, the owner or person in charge of property is not liable, as for negligence, for injuries to licensees

due to mere defects or dangers in the condition of the property or premises, or, as it has been expressed, due to passive negligence or acts of omission.'

"Undoubtedly the facts indicate that defendants were negligent in failing to repair the lounge before the accident. Such omission is passive negligence, which is not actionable where the relation of licensor and licensee exists, as in this case. In such a situation a licensee cannot recover for injuries sustained as the result of the licensor's failure to exercise ordinary care, *supra* 3.

"Plaintiff in this court defines a trap as 'a hidden danger lurking upon the premises which may be avoided if known.' If we accept this definition and apply it to the occurrence which resulted in plaintiff's injury, we find that, having arisen from the lounge, plaintiff was walking around to the front of it when she fell because her foot became entangled in a loose leg of the lounge which was pushed to the west and north as she got off the lounge. This all occurred in daylight. The protruding leg obviously was clearly apparent as she walked toward it and was tripped thereby. The leg, at the time and just before she tripped over it, was not hidden or lurking and was, therefore, not a trap. Had she been injured by a collapse of the lounge while she sat on it, a different question would have been presented.

"We hold that the facts, under Wisconsin law, support the finding and judgment of the district court."

(b) The Court of Appeals Correctly Held That the Chaise Lounge Over Which Petitioner Tripped Was Not a Trap as Defined by Wisconsin Law and Respondents Were Not Guilty of Active Negligence in Failing to Replace the Missing Screws in the Chaise Lounge.

Petitioner's argument that a trap is an issue of fact for the jury is completely answered by the above opinion of the Court of Appeals wherein it cites Wisconsin cases which have defined a trap to be a hidden or concealed danger, not an open and obvious condition on the landowner's premises as existed here. In *Lewko v. Chas. A. Krause Milling Co.*, 179 Wis. 83, 190 N.W. 924, the court said (page 86):

> "Where this court has held a defendant liable for a dangerous condition of premises as to licensees or trespassers it has been in cases such as Kelly v. Southern Wis. R. Co. 152 Wis. 328, 140 N.W. 60, and Ptak v. Kuetemeyer, 177 Wis. 262, 187 N.W. 1000, where the dangers were in public streets where children had a right to be; or in cases where the danger constituted a hidden death trap as did the electric wires in Meyer v. Menominee & M. L. & T. Co. 151 Wis. 279, 138 N.W. 1008, or an obscured pitfall in a licensed pathway as in Brinilson v. C. & N. W. R. Co. 144 Wis. 614, 129 N.W. 664, which was held to constitute active negligence.
>
> "Useful and not grossly negligent conditions and appliances on private property do not render the owner thereof liable to mere licensees or trespassers. To do so they must be of such a character as to constitute active negligence. The pit in question was open, obvious, and useful, and though dangerous to children, and perhaps to adults also, it cannot be classed as a hidden trap or a concealed death-dealing instrumentality."

The above language applies to the chaise lounge here involved which respondents and their child used for two

years in the condition it was at the time of the accident. Petitioner's accident occurred when she was on her feet and starting to walk. There is no contention here that the chaise lounge was concealed by lack of light, as the accident occurred during the daytime between 5:30 and 6:00 o'clock p.m. during July, 1956. (R 45)

Petitioner cites the cases of *Brinilson v. Chicago & N. W. R. Co.*, 144 Wis. 614, 129 N.W. 664 and *Ward v. Avery*, 113 Conn. 394, 155 A. 502 and contends that active negligence can mean a failure to act. Those cases can be distinguished upon their facts. The *Brinilson Case* involved a small boy who fell into a steam and hot water pit, inadequately covered by planks, below a walk used by the public, which was obviously a pitfall or a hidden trap. The *Ward Case* does not apply because it involved the duty of exercising ordinary care toward an invitee, while the instant action involves a licensee to whom such duty is not owed under Wisconsin law, *Greenfield v. Miller*, 173 Wis. 184, 180 N.W. 834. Active negligence has been defined as relating to activities conducted on premises, whereas passive negligence denotes negligence which permits defects or causes dangers upon property. *Wolfson v. Chelist*, 278 S.W. 2d 39, 47 (Mo. 1955); *Potter Title & Trust Co. v. Young*, 80 A 2d 76, 78 (Pa. 1951). While the failure to have a piece of outdoor furniture in perfect repair may be evidence of lack of ordinary care, it certainly is not the setting of a trap or active negligence as those terms have been defined under Wisconsin law and which is set forth in the above opinion of the Court of Appeals.

The remaining cases cited by counsel for petitioner can also be readily distinguished on their facts. A reading of each of those cases shows they all involved a hid-

den or concealed trap. In *Jablonski v. Bay City*, 248 Mich. 306, 226 N.W. 865, a pedestrian tripped over a low wire which ran along a city sidewalk which was practically invisible because of a light fall of snow. *Debes v. Morganroth*, 136 A. 2d 896 (N.J. App. Div.) involved a house guest falling down a cellar stairway where the door opened over the cellar steps and the doors in the foyer leading both to the bedroom, where the guest was attempting to go, and the cellar stairway were indiscernible in shape and appearance. Petitioner's counsel also cites *Malmquist v. Leeds*, 245 Minn. 130, 71 N.W. 2d 865 and *Rushton v. Winters*, 331 Pa. 78, 200 A. 60. It will be noted in the record that the District Court attached an ADDENDUM dated September 16, 1957 to its opinion granting summary judgment to respondents which considered and distinguished these cases as follows:

> "Since the foregoing opinion was transcribed, plaintiff's counsel in a letter of September 11, 1957, has cited the case of *Rushton v. Winters*, 200 A. 60 (Pa.), and in a letter of September 13, 1957, the case of *Malmquist v. Leeds*, 71 N.W. 2d 863 (Minn.). As before pointed out, this matter must be determined under the law of Wisconsin, and the law of other jurisdictions is not in point. Nevertheless, in the *Rushton* case, where there was a defective, unsafe railing, nine feet above a concrete driveway, it should have been apparent that an unreasonable risk of harm was involved; that the condition could be classified as a trap. It is in no way comparable to the situation here involved.
>
> "In the *Malmquist* case, there was an excavation which was obviously very dangerous. By its very nature it constituted a serious risk to any visitor who attempted to use the back entrance. The defendants realized the danger involved. Again, the situation

was not, in the opinion of the court, comparable to the present problem." (R 102)

The District Court also made this observation which applies to some of the cases cited above by petitioner's counsel:

> "In some jurisdictions the test is laid down as to whether the host realizes that the condition involves an unreasonable risk to the guest. While that is not the rule in Wisconsin, and even if it were, one would be loathe to hold that a jury could find that a condition of a chair which had been satisfactory to the family of the owner for two years and on which no one had previously been hurt or had any trouble created an unreasonable risk to the guest." (R 102)

On the other hand, the learned District Court cited a number of cases involving a licensee tripping over an object on the landowner's premises which the court held was neither a trap nor active negligence. These cases are: A guest tripping over defective weather stripping on the doorsill, *Roth v. Prudential Life Ins. Co. of New York*, 42 N.Y.S. 2d 592; a child falling over a wooden stake left in the ground a month after it was used by the landowner, *Passer v. Schimmel*, 158 N.Y.S. 2d 694; a guest being injured when a crudely constructed loose stone in a walk rolled loose while the guest stepped on it, causing him to fall, *Wilder v. Ayers*, 156 N.Y.S. 2d 85; a guest being injured because of broken concrete in the passageway owned by the defendant, *Comeau v. Comeau*, 189 N.E. 588, 92 A.L.R. 1002; a guest catching the heel of her shoe in a broken register, *Colvert v. Ricker*, 49 N.E. 2d 459, 147 A.L.R. 647. (R 100)

CONCLUSION

There are no disputed facts before the Court, and on the basis of the aforementioned authorities where the issue before the Court was thoroughly presented, respondents are entitled, as a matter of law, to dismissal of the petitioner's action against them. As was said in *Christianson v. Gaines*, 174 F. 2d 534, 536:

> "'The principle seems to be that if, under the facts developed, the court at a trial would be required to direct a verdict for the moving party, then a summary judgment should be entered.' Miller v. Hoffman, D.C., 1 F.R.D. 290, 292."

There are no unique or cogent reasons for review of this case by this Court. There is no conflict among the Courts of Appeals or question of public policy involved. As petitioner admits, the substantive law of Wisconsin governs this case and the decision of the Court of Appeals correctly applies that law.

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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